No. 17737

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Northwestern Mutual Life Insurance Company,

Appellant

vs.

Muriel Montgomery, et al.,

Respondents

APPELLANT'S OPENING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL INSURANCE COMPANY,

Appellant,

vs.

MILTON MICHAELSON, *et al.*,

Respondents.

APPELLANT'S OPENING BRIEF.

Statement of the Action.

This action was commenced by the plaintiffs, Milton Michaelson and Yetta Michaelson, against the defendants, Northwestern Mutual Insurance Company, hereinafter referred to as "Northwestern", and the Niagara Fire Insurance Company, hereinafter referred to as "Niagara".

Subsequently, by stipulation, the action was settled with respect to the plaintiff assureds by an advance in the sum of $16,000.00 subject to appropriate provisions of the stipulation whereby jurisdiction was retained by the court for the purpose of resolving the issue of the liability of the respective defendant insurance companies.

The trial court entered judgment holding that both defendant insurance companies' policies applied and each were responsible for one-half of the loss.

Statement of Facts.

The action was commenced by the Plaintiffs in the United States District Court, Southern District of California, Central Division, by reason of diversity of citizenship between the plaintiffs and defendants, and the court found as true the existence of the diversity and the fact that the controversy exceeded the sum of $10,000.00. [Finding of Fact I and II.]

On July 17, 1959 fire damaged property belonging to Milton Michaelson and Yetta Michaelson to the extent of $16,000.00. [Finding of Fact II.]

The Northwestern had issued their policy no. 1003-8589 to Milton Michaelson and Yetta Michaelson with respect to property located at 5887 Blackwelder Street, Culver City, California, for a term commencing May 13, 1958. The amount of the policy was $19,000.00 with a 90% average clause and provided for a loss payable to the Bank of America, National Trust and Savings Association. [Finding of Fact IV.]

The Niagara had in force, by reason of a binder, insurance coverage for Milton Michaelson and Yetta Michaelson with respect to property located at 5887 Blackwelder Street, Culver City, California, with a limit of $19,000.00 for a term of three years commencing June 15, 1959. Said policy provided for a loss payable to the Bank of America, and for the 90% average clause. [Finding of Fact V.]

Ernie Peters, hereinafter referred to as "Peters", was a licensed and authorized agent for the Niagara and also for the Northwestern. [Rep. Tr. p. 26.]

Prior to June 15, 1959 the Northwestern advised Peters that they desired to have the Northwestern pol-

icy cancelled. Peters so advised Michaelson. [Rep. Tr. p. 28, lines 3 to 16; p. 9, lines 2 to 4; p. 13, line 25; p. 14, lines 1 to 13; p. 15, lines 1 and 2.] Michaelson agreed that the insurance coverage in Northwestern could be cancelled and rewritten and Peters bound coverage in the Niagara for the same amount and in accordance with the same terms and conditions as those contained in the Northwestern policy. Peters prepared an application with respect to the coverage that was bound and prior to June 15, 1959 forwarded this application to the Niagara office. [Rep. Tr. p. 30, line 18, to p. 31, line 4.] The Niagara delayed issuing the formal policy and at the time of the fire, July 17, 1959, the formal policy had not been issued. [Rep. Tr. p. 32, lines 4 to 17.]

Up to the time the fire occurred neither Peters nor anyone else had been advised by the Niagara that the Niagara was not going to issue a policy. [Rep. Tr. p. 33, lines 3 to 6.]

Mr. Michaelson was charged for the Northwestern policy only until June 15, 1959, and he was given a return premium on a pro-rata basis as of that date. [Rep. Tr. p. 38, lines 12 to 17.]

Issues on Appeal.

The Appellant, Northwestern, asserts that the following Findings of Fact and Conclusions of Law are not supported by the evidence, the record, or the law:

> *Finding No. IV.* "It is true that on July 17, 1959 there was in force a policy of insurance between defendant Northwestern Mutual Insurance Company and the plaintiffs insuring plaintiffs against loss or damage by fire in an amount not exceeding $19,000.00."

Finding No. VI. "It is not true that the policy of insurance issed by defendant Northwestern Mutual Insurance Company was cancelled prior to the loss and damage sustained by plaintiffs."

Finding No. VII. The following portion of Finding of Fact No. VII: "It is true that each of the defendants, to wit, Northwestern Mutual Insurance Company and Niagara Fire Insurance Company, is liable to plaintiffs for one-half of the loss sustained by plaintiffs, * * *".

Finding No. VIII. "Neither of the defendants is liable to the other defendant in any sum whatsoever."

Finding No. IX. This Finding states that it incorporates as a finding of fact the court's Memorandum of Decision dated October 4, 1961, and the Appellant asserts as a Statement of Point on Appeal each and all portions of said Memorandum of Decision inconsistent with the Points on Appeal hereinbefore set forth in this Statement of Points.

The following Conclusion of Law is not supported by the evidence and is contrary to the evidence:

"* * * that neither defendant is liable to the other defendant for any sum whatsoever, * * *"

ARGUMENT.

The Appellant submits that by reason of the following premises the Findings of Fact, Conclusions of Law and Judgment of the trial court are in error:

A. That the assured, Michaelson, and the Northwestern reached a cancellation by mutual agreement.

B. That in any event the Northwestern policy was cancelled by operation of the principle of insurance law, cancellation by substitution.

C. That the cancellation in this instance was not contingent upon:

(a) The return of the Northwestern policy.

(b) Any act on the part of the loss payee Bank of America.

A. That the Assured, Michaelson, and the Northwestern Reached a Cancellation by Mutual Agreement.

"Obviously, there is no sound reason why a policy of insurance, as any other contract, may not be cancelled or rescinded through an agreement of both parties to the contract. Otherwise, an insurance policy cannot be cancelled by the insurer except by virtue of a power granted by statute, or reserved to the company by a stipulation in the policy."

83 A. L. R. 299.

"Sec. 293. By Agreement.—Ordinarily, cancellation of an insurance policy may be effected by mutual consent, independent of the terms of the policy, at any time before occurrence of the event insured against. * * * "

27 Cal. Jur. 2d pp. 792, 793.

Peters, agent for the Northwestern, arranged with Michaelson for cancellation of the Northwestern policy by mutual agreement. Michaelson testified as follows:

> "He (Peters) mentioned that Northwestern intended to cancel out * * * by mutual agreement as far as I recall." [Rep. Tr. p. 9, lines 2 to 4.]

There was introduced into evidence the statement of the assured, Michaelson, which included the following:

> "On the day before the fire I saw my agent, Mr. Peters, and he stated he had placed coverage with Niagara Fire to replace the coverage expiring or being cancelled in the Northwestern Mutual Insurance Company. My agent Peters advised me that the Niagara Insurance Company was on the risk * * *" [Rep. Tr. p. 14, lines 5 to 10.]

The Court struck from the testimony of Peters this statement with respect to the transaction with Michaelson:

> "I believe so, yes. It was agreed that we would rewrite the coverage." [Rep. Tr. p. 28, lines 23 and 24.]

The Appellant submits that this was erroneously stricken as it went to the establishment of the fact that Michaelson and Peters reached an agreement with respect to the Northwestern policy.

B. That in Any Event the Northwestern Policy Was Cancelled by Operation of the Principle of Insurance Law, Cancellation by Substitution.

The rule on cancellation of insurance by substituting new insurance for existing insurance is stated in 27 Cal. Jur. 2d 793, Insurance §293:

> "Generally, the procurement of new insurance with intent that it shall take the place of existing insurance, and with no intent to thereby acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, in which case the insured may not recover under both policies, despite physical possession, by the insured or his agent, of the original policy, and though the premium return, due on cancellation of the original policy, has not been made at the time the loss occurs."

This rule is also expressed in 45 C. J. S. 118, Insurance §458, as follows:

> "*Obtaining new insurance.* It has been held that the act of insured in procuring new insurance on property for a term commencing before expiration of existing insurance thereon, and with intent to have the new insurance replace the existing insurance and without intent to acquire additional insurance, constitutes in legal contemplation a voluntary cancellation of the existing insurance."

A similar statement appears in 6 *Appleman Insurance Law and Practice* 791, §4225, where the author states:

> "Procuring new insurance to commence before the expiration of existing insurance, without an intent to acquire additional insurance, constituted a voluntary cancellation by the insured."

The subject is again touched upon in the same volume, page 769, §4196, as follows:

> "The substitution by an agent of a new policy for the old one, with the consent of the insured, operated to release the first insurer from liability, even though its policy had not been formally cancelled at the time of the loss."

Among the cases holding that substitution of new insurance for old insurance effects a cancellation of the old insurance are:

Strauss v. Dubuque Fire & Marine Ins. Co. (1933), 132 Cal. App. 283, 22 P. 2d 582;

Stevenson v. Sun Insurance Office (1911), 17 Cal. App. 280, 119 Pac. 529;

Bache v. Great Lakes Ins. Co. (1929), 151 Wash. 494, 276 Pac. 549;

White v. Ins. Co. of N. Y. (R. I. 1899), 93 Fed. 161;

Pagliero v. Merchants Fire Assur. Corp. (9 C. A. 1948), 169 F. 2d 373;

Wells Petroleum Co. v. Fidelity-Phenix Fire Ins. Co. (D. C. Ill., 1954), 121 Fed. Supp. 739.

The facts in the *Wells Petroleum* case are similar to those in the case at bar. Wells Petroleum had been insured by six different companies in amounts totalling

$30,800. Its insurance broker had obtained this insurance through a general agency, Homer Gwinn & Company. The broker ceased doing business with this agency and decided to replace these six policies with six policies in six other companies. On 3 August 1950 he obtained such new insurance, totaling $31,000. The broker and the general agency could not agree as to whether the insured should receive return premiums calculated on a pro rata basis or a short rate basis. On 9 November 1950 the insured sustained a severe fire loss. The insured still had possession of the old policies at that time. The companies which had issued the new insurance policies adjusted the loss on the basis that the old policies were still in force and effect and should pay, roughly, one-half of the loss. They agreed, however, that if the old insurance had been cancelled prior to the loss, the adjustment would be reopened and the new insurance would pay the entire loss. Suit was filed against the old companies only. At the close of plaintiff insured's case, the defendants moved for a directed verdict and the motion was granted.

The court said, 121 Fed. Supp. 739, at pp. 742-743:

> "It clearly appears from the plaintiff's evidence that it was not the intention of either the broker, Baal, or the insured, plaintiff herein, at any time prior to the occurrence of the fire to obtain additional insurance coverage upon the property and rather that it was their clear intention to replace the original policies issued through the Homer Gwinn & Company agency and to substitute therefor new policies issued through the American Insurance Agency, Inc. There was no desire on the part of the plaintiff to vary its original instructions to its

broker, Baal; namely, to procure coverage upon the property in the approximate sum of $32,000. It was not their intention to double this coverage or to increase it in any manner."

The court, in the *Wells Petroleum* case, also pointed out that no formal or written notice of cancellation by the insured is required. The court then said, 121 Fed. Supp. 739, at 746:

> "For the foregoing reasons it is the Court's opinion that the policies of insurance herein sued upon were effectively cancelled on August 3, 1950, prior to the date of the fire, November 9, 1950, by virtue of replacement and substitution; that the physical possession of said policies in the hands of the plaintiff on the date of the fire and the fact that the unearned premium, whether pro-rata or short rate, had not yet been returned by the defendants to the claimant on the date of the fire is immaterial and the Court was therefore compelled to grant the motion of each of the defendants for directed verdict."

The court fixed the date of cancellation in *Wells Petroleum* as 3 August 1950. This is significant as the Homer Gwinn general agency was not notified until some days later, and the old policies were not returned until after the fire.

The Court found and the record amply supports the Findings of Fact that the Niagara had in force insurance coverage effective June 15, 1959 in the same amount as that specified in the Northwestern policy. [Finding of Fact V.]

Michaelson did not intend to have coverage both in the Northwestern and the Niagara. [Rep. Tr. p. 24, lines 5-14.]

Peters did not intend that there be coverage existing in both the Northwestern and the Niagara. [Rep. Tr. p. 33, lines 17-20.]

The Niagara coverage was written for the purpose of rewriting the Northwestern coverage effective as of June 15, 1959. [Rep. Tr. p. 28, lines 12-16.]

Michaelson knew that Peters was arranging for other insurance [Rep. Tr. p. 16, lines 16-20], and knew before the fire that the Northwestern coverage had been replaced with the Niagara. [Rep. Tr. p. 14, lines 5-10.]

The coverage rewritten by Peters in the Niagara was the same as the coverage specified in the Northwestern. [Rep. Tr. p. 73, line 25; p. 74, lines 1-10.]

Peters returned a pro-rata portion of the premium with respect to the Northwestern policy to Michaelson who was charged for coverage to June 15, 1959. [Rep. Tr. p. 38, lines 12-17.]

C. That the Cancellation in This Instance Was Not Contingent Upon:

(a) The Return of the Northwestern Policy.

As stated in 27 Cal. Jur. 2d 793, Section 293, *supra*:

> "Generally, the procurement of new insurance with intent that it shall take the place of existing insurance, and with no intent to thereby acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, *in which case the insured may not recover under both policies, despite physical possession, by the insured*

or his agent, of the original policy, and though the premium return, due on cancellation of the original policy, has not been made at the time the loss occurs." (Emphasis added.)

The record is devoid of any condition in the transaction between Michaelson and Peters with respect to the termination of the Northwestern coverage being contingent upon the return of the Northwestern policy.

Conversely, the facts heretofore indicated shown on the part of both of the contracting parties, that is Michaelson the assured, and Northwestern, that the Northwestern coverage be terminated June 15, 1959. Both of these parties stated that they did not intend that both the Northwestern and Niagara policies stay in force. The Niagara coverage became in effect June 15, 1959.

C. That the Cancellation in This Instance Was Not Contingent Upon:

(b) Any Act on the Part of the Loss Payee Bank of America.

Cancellation by mutual agreement or by substitution can be effective as to the assured even if it is not effective as to a loss payee.

In the case of *Lauman v. Springfield Fire & Marine Ins. Co.,* 184 Cal. 650, 195 Pac. 50, under circumstances where the assured stated to the agent as follows: "Why worry . . . the policy is cancelled and your company has no liability", the court held that the policy was cancelled as to the assured. The court further found that under the circumstances of the *Lauman* case where the loss payee, Dodd, did not agree to the cancellation or have notice, that as to Dodd there was coverage.

The court denied coverage to the assured *Lauman* who appealed from the trial court judgment to this effect.

In this instance the court has found and the evidence supports the Finding of Fact that the Niagara coverage was issued to replace the Northwestern and by the law heretofore set forth such substitution constitutues a cancellation as to the assured Michaelson. The appellant also asserts, as hereinbefore set forth, that Michaelson and Northwestern reached a mutual agreement of cancellation.

The test as to whether there was a cancellation by substitution is set forth in the case of *K. C. Working C. Co. v. Eureka-Sec. Ins. Co.*, 82 Cal. App. 2d 185:

> "The real test of whether new insurance had been procured is whether appellant could have recovered for the loss from some company other than respondent."

The court in this action has found that Michaelson had coverage and can recover from Niagara.

By the foregoing law and premise the appellant submits that the policy of Northwestern was cancelled with respect to Michaelson and further submits the following with respect to any interest of the loss payee, Bank of America:

(a) The Bank of America was named as loss payee under the Niagara coverage and was adequately protected thereby.

(b) Peters was agent for the Niagara, arranged for the Niagara coverage, and the loss payable thereunder to the Bank of America, and if the Bank of America does not complain of such a procedure it can be presumed that they ratify the acts of the Niagara's agent.

(c) That the interest of the loss payee, Bank of America, is not or was not in issue by the pleadings or this litigation, and the Bank of America is not a party to this action.

(d) That in any event the record establishes that the interest of the Bank of America in this matter was the sum of $5,920.02 and that at most Northwestern's liability with respect to any interest of the loss payee, Bank of America, would be one-half.

> "The 'interest' of the mortgagee referred to in such a clause is not his interest in the property insured but the 'interest' or amount which the mortgagor has appointed him to collect from the proceeds of the policy." *Hayward Lumber Co. v. Lyders,* 139 Cal. App. 517.

The record establishes that at the time of the fire, the amount owed to the loss payee, Bank of America, was the sum of $5,920.02.

Conclusion.

The Appellant respectfully submits that the record and the law establish that the Northwestern policy was cancelled and that no obligation rests on the Northwestern with respect to the payment of any of the loss suffered by Michaelson, and that Northwestern is entitled to judgment against Niagara in the amount of the sum advanced to Michaelson.

Respectfully submitted,

BOLTON, GROFF & DUNNE,
Attorneys for Appellant Northwestern Mutual Insurance Company.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GENE E. GROFF